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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 ELIJAH COOPER,

16 Defendant.
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Case No. 13 Cr. 693 SI

NOTICE OF MOTION AND MOTION TO
DISMISS COUNT TWO OF THE
SUPERSEDING INDICTMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT

Date: October 31, 2014
Time: 11:00 a.m.

Before the Honorable Susan Illston
United States District Judge

20
21 TO: MELINDA HAAG, UNITED STATES ATTORNEY, and BENJAMIN TOLKOFF and
WAI-SHUN "WILSON" LEUNG, ASSISTANT UNITED STATES ATTORNEYS

22 PLEASE TAKE NOTICE that on October 31, 2014, at 11:00 a.m., or as soon thereafter
23 as he may be heard, defendant Elijah Cooper, by and through his counsel, will and does hereby
24 move this Court for an Order dismissing count two of the superseding indictment.

25 **MOTION**

26 Elijah Cooper moves this Court pursuant to the Due Process clause of the Fifth
27 Amendment and all other applicable case law and statutes for an Order dismissing count two of
28

1 the superseding indictment. Mr. Cooper contends that the complete absence of any factual
2 assertions to support the conspiracy allegation renders count two insufficient and it must be
3 dismissed.

4 This motion is based on the instant notice of motion and motion, the Court's July 31,
5 2014 Order addressing pretrial motions, *see* ECF No. 65, the attached memorandum of points
6 and authorities, the Declaration of Ethan A. Balogh Filed September 26, 2014, the documents on
7 file in the Clerk's Record, and any and all other materials that may come to this Court's attention
8 at the time of the hearing on this motion.

9 Respectfully submitted,

10 DATED: September 26, 2014

COLEMAN, BALOGH & SCOTT LLP

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12 */s/ E A Balogh*
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15 Attorneys for Defendant
16 ELIJAH COOPER
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Background**

3 Defendant Elijah Cooper is charged in a two-count superseding indictment with
4 distributing crack cocaine on February 5, 2013, and with conspiring with unnamed persons, from
5 February 4 through May 29, 2013, to distribute crack cocaine. ECF No. 67. The grand jury
6 returned this superseding indictment in response to this Court's Order dismissing count two—the
7 conspiracy count—in response to Mr. Cooper's motion to dismiss. *See* ECF No. 65 at 5-7.

8 As pleaded in the initial indictment, count two alleged as follows:

9 COUNT TWO: (21 U.S.C. § 846 - Conspiracy to Distribute Cocaine Base)

10 2. Beginning on an unknown date but no later than February 4, 2013, and
11 continuing until at least on or about May 29, 2013, in the Northern District of
12 California, the defendant, ELIJAH COOPER, knowingly and intentionally
13 combined, conspired, confederated and agreed with other persons known and
14 unknown to the Grand Jury, to commit the following offense against the
United States: to distribute 28 grams or more of a mixture and substance
containing cocaine base, a Schedule II controlled substance, in violation of
Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(iii), all in
violation of Title 21 United States Code, Section 846.

15 ECF No. 1.

16 As pleaded in the superseding indictment, count two now alleges as follows:

17 COUNT TWO: (21 U.S.C. § 846- Conspiracy to Distribute Cocaine Base)

18 2. From on or about February 4, 2013, and continuing until on or about May
19 29, 2013, in the Northern District of California, the defendant, ELIJAH
20 COOPER, knowingly and intentionally combined, conspired, conspired [sic],
21 confederated and agreed with other persons known and unknown to the Grand
Jury to commit the following offense against the United States: to distribute
twenty-eight grams and more of a mixture and substance containing cocaine
base, a Schedule II controlled substance, in violation of Title 21, United States
Code, Sections 841(a)(1) and 841(b)(1)(B)(iii), all in violation of Title 21,
22 United States Code, Section 846.

23 ECF No. 67. As is plain, count two of the superseding indictment is nearly identical to
24 the count dismissed by the Court from the original indictment.

25 **II. Argument**

26 Because the Court addressed in the first round of motions a challenge to the sufficiency of
27 a nearly identically worded conspiracy count, Mr. Cooper will rely on the Court's work and
28 findings. To begin, as the Court recognized:

1 An indictment is sufficient to withstand a defendant's motion to dismiss 'if it
2 contains the elements of the charged offense in sufficient detail (1) to enable
3 the defendant to prepare his defense; (2) to ensure him that he is being
4 prosecuted on the basis of the facts presented to the grand jury; (3) to enable
5 him to plead double jeopardy; and (4) to inform the court of the alleged facts
6 so that it can determine the sufficiency of the charge.' *United States v. Rosi*, 27
7 F.3d 409, 414 (9th Cir. 1994) (citation omitted).

8 ECF No. 65 at 6.

9 Applying this standard, the Court should find count two insufficiently pleaded,
10 and the Court should dismiss it. And it should do so for the same reasons it found
11 appropriate with respect to the initial indictment, *viz.*,

12 Count Two of the indictment fails to provide 'the substantial safeguards to
13 criminal defendants that indictments are designed to guarantee.' *United States*
14 *v. Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979) (per curiam) (citation and
15 internal quotation marks omitted). Count Two charges Cooper with
16 conspiracy to distribute cocaine base. It alleges that, "[f]rom on or about
17 February 4, 2013, and continuing until . . . on or about May 29, 2013, in the
18 Northern District of California," Cooper conspired with "other persons known
19 and unknown to the Grand Jury . . . to distribute [twenty-eight] grams or more
20 of a mixture and substance containing cocaine base. . . Indictment at 2.
21 Although Count Two adequately tracks the statutory language, it fails to
22 provide sufficient detail regarding when the alleged conspiracy took place, or
23 any detail at all regarding who the alleged coconspirators were or any facts
24 regarding what they were alleged to have done. *See Cecil*, 608 F.2d at 1297
25 (reversing district court's denial of motion to dismiss indictment where the
26 time frame was "open-ended in both directions," and the "indictment clearly
27 lacked a statement of the facts and circumstances that would inform the
28 accused of the specific offenses with which they were charged").

Id. at 6-7.

The Court should thus find that, even two months after it issued its dispositive Order:

Cecil is still binding authority to the extent it requires that 'an indictment [for
violation of 21 U.S.C. § 846 must] contain a few basic factual allegations [to]
accord[] defendants adequate notice of the charges against them and assure[]
them that their prosecution will proceed on the basis of facts presented to the
grand jury.' 608 F.2d at 1297.

Id. at 7.

The only remaining question is whether the Court should dismiss count two with
prejudice. The Court instructed the Government that, to be sufficient, its section 846 conspiracy
allegation must set forth some "factual allegations" to provide adequate notice and assure that the
defendant will be tried *only* on the facts presented to the grand jury. *Id.* In response, the
Government voiced its disagreement with the Court's Order by refusing to accept and honor it.

1 Most directly, the Government's new indictment does not contain "sufficient detail (1) to enable
2 [Mr. Cooper] to prepare his defense; (2) to ensure him that he is being prosecuted on the basis of
3 the facts presented to the grand jury; (3) to enable him to plead double jeopardy; [or] (4) to
4 inform the court of the alleged facts so that it can determine the sufficiency of the charge." ECF
5 No. 65 at 6. And while knowing as much, and knowing that it could identify the conspirators
6 reportedly "known to the grand jury" and knowing it could identify, if they exist, facts to
7 demonstrate the sufficiency of the charge, the Government again refused to provide them. To be
8 sure, the Court should consider the Government's response before deciding the question. But
9 Mr. Cooper can divine no proper basis for the Government's studious rejection of this Court's
10 directive, and on this record, the Court should dismiss count two of the indictment with
11 prejudice.

12 Respectfully submitted,

13 DATED: September 26, 2014

COLEMAN, BALOGH & SCOTT LLP

14 */s/ E A Balogh*

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Dated: September 26, 2014

/s/ E A Balogh
ETHAN A. BALOGH